A

Yoon Goon How v Aston Villa Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCvC-808–11 OF 2018
MOHD JOHAN LEE JC
22 FEBRUARY 2023

C *Contract — Oral agreement — Existence of oral agreement — Plaintiff sued defendant for arrears of salary contending he took salary cut to help defendant tide over hard times and on defendant's promise to pay him the deducted arrears in due course — Whether apart from his bare averment, plaintiff failed to adduce any corroborative evidence to back his claim — Whether evidence showed plaintiff* D *accepted salary cut without objection over long period of time and later accepted fees as consultant on ad hoc basis — Whether it defied common sense for senior and seasoned corporate figure like plaintiff to claim he did not put anything in writing (if he was actually owed arrears of salary) or lodge any complaint with the relevant authorities (if he was subjected to oppressive terms of employment) — Whether* E *Court found plaintiff's claim unconvincing on balance of probabilitie*

The plaintiff in the instant action sought judgment against the defendant for, inter alia, arrears of salary amounting to RM1,897,510. The claim was premised upon an oral collateral contract the plaintiff alleged that he had with F the defendant. Since October 2004, the plaintiff was employed as the defendant's general manager. The plaintiff contended that due to financial constraints faced by the defendant, he agreed in 2012 to accept a 50% reduction in his monthly salary on the defendant's oral promise that he would be paid the deducted portions of his salary when the defendant's financial G situation improved, particularly when it launched two tower projects that it was working on. The plaintiff claimed that at all material times he was in the defendant's employ as a monthly-salaried general manager and never as an ad hoc consultant. The plaintiff claimed the defendant had breached its oral promise to him, made misrepresentations and exercised undue influence upon H him to induce him into agreeing to the salary cut. The defendant, on the other hand, denied that it had any oral collateral contract with the plaintiff and also denied the allegations of misrepresentation and undue influence. The defendant contended that the two tower projects referred to by the plaintiff never materialised and were never within the defendant's knowledge or I contemplation in September 2012 in order for the plaintiff to rely upon them as the basis of his alleged oral contract. The defendant alleged that from September 2012 until June 2014, the plaintiff accepted payment of half of his salary without any objections or complaints and from February 2016 onwards he accepted consultancy fees on an ad hoc basis without objections since the

defendant did not have sufficient jobs or projects at the time. The defendant contended that it never promised the plaintiff that the reductions in his salary would be paid to him when the defendant's economic situation improved. The defendant also pleaded that the plaintiff's claim was time-barred under the Limitation Act 1953.

Held, dismissing the plaintiff's claim:

(1) The plaintiff had failed to prove the existence of an oral collateral contract between himself and the defendant or the existence of any representation or promise made to him by the defendant in September 2012 in connection with his salary cuts (see paras 45–46).

(2) The facts and evidence showed that in late 2012, the two tower projects (which formed the substratum of the alleged collateral contract) did not even exist and were not within the defendant's knowledge at that point in time. It was also against common sense that a senior and seasoned corporate person like the plaintiff would fail to put into writing a crucial arrangement such as the deferred payment of the arrears of his salary. The absence of any such natural and ordinary practice and the plaintiff's failure to make any mention of the arrears of salary due to him in his communications with the defendant only confirmed the court's finding that there was never any such arrangement in the first place (see para 44).

(3) Apart from his own averment that he had a collateral contract with the defendant, the plaintiff failed to provide any corroborating evidence to support his claim. In fact, the contemporaneous documents did not support the plaintiff's claim. On balance of probabilities, the plaintiff had not proven his case and the defendant's argument that there was no oral collateral contract was more convincing than the plaintiff's narrative (see paras 36 & 40).

(4) The evidence showed that the plaintiff's designation was indeed changed from general manager to Consultant in 2016. The fact that the plaintiff did not demand for his income tax deduction to be made and his failure to lodge any complaints to that effect showed that the plaintiff had accepted his role and designation as consultant for the defendant (see para 59).

(5) The contemporaneous documents and the conduct of the parties suggested that the plaintiff had agreed to be a consultant and had accepted payment of consultancy fees on an ad hoc basis. The consultancy payment slip was signed by the plaintiff voluntarily at all material times. This was confirmed by the plaintiff himself during cross-examination wherein he confirmed receiving the payments without

EPF contributions or income tax deductions and that did not file any complaint with the income tax department or any other authority (see para 61).

(6) There was no evidence that the defendant had exercised any undue influence or coercion on the plaintiff (see paras 62).

(7) The court agreed with the defendant that the only inference that could be drawn from the plaintiff's conduct and silence and lack of objection for a long period of time was that the plaintiff had consented to and/or accepted the 50% salary deduction and the change of his designation to a consultant of the defendant. Having led the defendant to believe that he had no objections to either of those two matters, the plaintiff was now estopped from contending otherwise (see paras 73 & 78).

(8) The plaintiff's action was time-barred under the Limitation Act 1953 as his cause of action accrued in September 2012, when the first deduction to his salary took place (see paras 79–80).

[Bahasa Malaysia summary

Plaintif di dalam tindakan ini memohon penghakiman terhadap defendan, antara lain, untuk tunggakan gaji berjumlah RM1,897,510. Tuntutan itu berdasarkan kontrak kolateral lisan plaintif yang dikatakan dimasuki bersama defendan. Plaintif bekerja sebagai pengurus besar defendan sejak Oktober 2004. Plaintif berhujah bahawa disebabkan kekangan kewangan yang dihadapi oleh defendan, beliau bersetuju pada 2012 untuk menerima pengurangan 50 peratus daripada gaji bulanannya atas janji lisan defendan bahawa beliau akan dibayar sebahagian daripada gajinya yang ditolak apabila keadaan kewangan defendan bertambah baik, terutamanya apabila mereka mengusahakan dua projek menara yang sedang diusahakannya. Plaintif menyatakan pada setiap masa material beliau bekerja sebagai pengurus besar bergaji bulanan dan tidak pernah menjadi perunding ad hoc. Plaintif mendakwa defendan telah melanggar janji lisannya kepadanya, membuat salah nyata dan menggunakan pengaruh yang tidak wajar kepadanya sehingga mendorongnya supaya bersetuju dengan pemotongan gajinya. Sebaliknya, defendan menafikan bahawa terdapat sebarang kontrak kolateral lisan dengan plaintif dan juga menafikan dakwaan salah nyata dan pengaruh yang tidak wajar. Defendan berhujah bahawa kedua-dua projek menara yang dibangkitkan oleh plaintif tidak pernah diusahakan dan tidak pernah berada di dalam pengetahuan atau pertimbangan defendan pada September 2012 untuk plaintif bergantung kepadanya sebagai asas tuntutan kontrak lisan. Defendan menyatakan bahawa dari September 2012 hingga Jun 2014, plaintif menerima pembayaran separuh daripada gajinya tanpa sebarang bantahan atau aduan dan mulai Februari 2016 dan seterusnya beliau menerima yuran perundingan secara ad hoc tanpa bantahan kerana defendan tidak mempunyai pekerjaan atau projek yang mencukupi pada masa itu. Defendan berhujah bahawa mereka tidak pernah

menjanjikan kepada plaintif bahawa pengurangan gajinya akan dibayar kepadanya apabila keadaan ekonomi defendan bertambah baik. Defendan juga memohon agar tuntutan plaintif dihalang oleh had masa di bawah Akta Had Masa 1953.

Diputuskan, menolak tuntutan plaintif:

(1) Plaintif telah gagal membuktikan kewujudan kontrak kolateral lisan antara dirinya dan defendan atau kewujudan sebarang representasi atau janji yang dibuat kepadanya oleh defendan pada September 2012 berhubung pemotongan gajinya (lihat perenggan 45–46).

(2) Fakta dan bukti menunjukkan bahawa pada akhir 2012, kedua-dua projek menara (yang membentuk perkara asas kontrak kolateral yang dikatakan) tidak wujud dan tidak berada dalam pengetahuan defendan pada masa itu. Ianya juga tidak masuk akal bahawa seorang ahli korporat kanan dan berpengalaman seperti plaintif gagal merekodkan perjanjian seperti tunggakan pembayaran gajinya. Ketiadaan sebarang amalan kebiasaaan dan kegagalan plaintif untuk menyebut sebarang tunggakan gaji yang terhutang kepadanya di dalam komunikasinya dengan defendan hanya mengesahkan dapatan mahkamah bahawa tidak pernah ada perjanjian sedemikian (lihat perenggan 44).

(3) Selain daripada pernyataannya bahawa beliau memasuki kontrak kolateral dengan defendan, plaintif gagal mengemukakan sebarang bukti kukuh bagi menyokong tuntutannya. Malah, dokumen-dokumen berkaitan juga tidak menyokong tuntutan plaintif. Plaintif gagal membuktikan kesnya di imbangan kebarangkalian dan hujahan defendan bahawa tiada kontrak kolateral lisan adalah lebih meyakinkan daripada naratif plaintif (lihat perenggan 36 & 40).

(4) Keterangan menunjukkan bahawa jawatan plaintif bertukar daripada pengurus besar kepada Perunding pada 2016. Fakta bahawa plaintif tidak menuntut potongan cukai pendapatannya dibuat dan kegagalannya untuk membuat sebarang aduan mengenai pertukaran itu menunjukkan bahawa plaintif telah menerima peranan dan jawatannya sebagai perunding bagi defendan (lihat perenggan 59).

(5) Dokumen-dokumen berkaitan dan tindakan pihak-pihak menunjukkan bahawa plaintif telah bersetuju untuk menjadi perunding dan telah menerima pembayaran yuran perundingan secara ad hoc. Slip pembayaran perundingan telah ditandatangani oleh plaintif secara sukarela pada setiap masa material. Perkara ini disahkan oleh plaintif sendiri semasa pemeriksaan balas di mana beliau mengesahkan menerima bayaran tersebut tanpa caruman KWSP atau potongan cukai pendapatan dan tidak memfailkan sebarang aduan kepada jabatan cukai pendapatan atau mana-mana pihak berkuasa lain (lihat perenggan 61).

(6) Tiada keterangan yang menunjukkan bahawa defendan telah membuat sebarang pengaruh atau paksaan yang tidak wajar terhadap plaintif (lihat perenggan 62).

(7) Mahkamah bersetuju dengan defendan bahawa satu-satunya kesimpulan yang boleh diambil daripada tindakan dan sikap tidak peduli plaintif dan ketiadaan bantahan untuk jangka masa yang panjang adalah plaintif telah bersetuju dan/atau menerima potongan gaji 50% dan penukaran jawatannya kepada perunding defendan. Oleh kerana beliau tidak mempunyai bantahan terhadap kedua-dua perkara itu, plaintif kini dihalang daripada menyatakan sebaliknya (lihat perenggan 73 & 78).

(8) Tindakan plaintif telah dihalang oleh had masa di bawah Akta Had Masa 1953 kerana kausa tindakannya sepatutnya bermula pada September 2012, apabila potongan gaji pertamanya berlaku (lihat perenggan 79–80).]

Cases referred to

Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd [2010] MLJU 576; [2010] 2 MLRA 1, CA (refd)
Barclays Bank plc v O'Brien & Anor [1993] 4 All ER 417, HL (refd)
Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Hua Realty Berhad v KTS News Sdn Bhd [2009] MLJU 75, HC (refd)
Muhamad Ridhwaan bin Mohamed Rafik v Regatta Maritime Sdn Bhd & Ors [2022] MLJU 2442, HC (refd)
Pembinaan SPK Sdn Bhd & Anor v Conaire Engineering Sdn Bhd-LLC [2022] 2 MLJ 659; [2022] 4 CLJ 357, CA (refd)
Polygram Records Sdn Bhd v The Search & Anor [1994] 3 MLJ 127, HC (refd)
Sulisen Sdn Bhd v Kerajaan Malaysia [2006] MLJU 341; [2006] 7 CLJ 247, HC (refd)
Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors [1996] 4 MLJ 331, HC (refd)
Thiagarajen a/l Veluchamy v Suraish Naidu a/l Re Naidu & Anor [2009] 9 MLJ 68, HC (distd)
Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182, FC (refd)

Legislation referred to

Contracts Act 1950 s 15
Evidence Act 1950 ss 101, 102, 115
Limitation Act 1953 s 6(1)
Penal Code

Ronnie Yoon Kok Seng (with Amira Afiqah bt Shaidin) (Scully Yoon) for the plaintiff.

Kimberly Yap Mei Chyi (with Khairun Niza bt Husnin) (Khairun Husnin & Kimberly) for the defendant.

Mohd Johan Lee JC:

INTRODUCTION

[1] Yoon Goon How ('plaintiff'), the general manager of Aston Villa Sdn Bhd ('defendant') had agreed to a 50% pay cut of his salary in view of the financial hardship facing the defendant. Later, the plaintiff's position was changed to that of a consultant. This is the plaintiff's claim ('this claim') for the alleged arrears of his salary previously deducted by the defendant which was, according to him, promised under an oral arrangement agreed between the parties in 2012.

BACKGROUND FACTS

[2] The plaintiff was the defendant's general manager from October 2004 to 31 January 2015. Based on a mutual understanding between the parties, the plaintiff was later appointed as the consultant of the defendant effective 1 February 2015.

[3] As at 2012, the plaintiff was given a monthly salary of RM41,400. However, due to the severe financial problem faced by the defendant towards the second half of year 2012, in order to alleviate the financial problem and in order to increase the case flow buffer, 50% of the salaries and allowances of all senior employees of the defendant including the plaintiff had been deducted.

[4] Hence, from September 2012 until June 2014, the plaintiff was paid RM20,200 instead of RM41,400. The plaintiff had duly signed all salary payslips and payment vouchers acknowledging that he had received the same without any objection.

[5] The plaintiff in his statement of claim alleged that the defendant in or around September 2012, had entered into an oral collateral contract with the plaintiff and had allegedly promised and represented to the plaintiff:

(a) that the defendant and/or its affiliated companies was developing two new projects, namely the 'Scott Tower Project' which consisted of 32 storey offices lots and 'My Penchala Residence Project';

(b) that the defendant would take approximately 50% deduction of the plaintiff's monthly salary e RM41,400 as a general manager until the

financial standing and cash flow of the defendant improved with the launch of the aforesaid two new projects by the defendant and/or its affiliated companies; and

(c) that the defendant would fully pay, refund and/or return in full all the deferred payments of approximately 50% reduction of the plaintiff's monthly salary to the plaintiff after the defendant's financial standing had improved.

[6] The plaintiff alleged that he was mistreated, misled and negligently misrepresented by the defendant and that there was undue influence by the Directors of the defendant where the Directors were in a very much superior position to control, manipulate and dominate the will of the plaintiff.

[7] The plaintiff then filed this claim against the defendant. In essence, the plaintiff sought for the following:

(a) a declaration or declaratory order that there exists a contract of employment between the plaintiff and the defendant as employee-employer with the plaintiff holding the position of general manager of the defendant at all material times;

(b) a declaration or declaratory order that there subsequently came into existence a collateral contract between the plaintiff and the defendant at all material times pertaining to all the deducted and/or deferred payments of the plaintiff's monthly salary on a temporary basis in connection with his contract of employment ('contract of employment');

(c) that the defendant shall fully pay to the plaintiff the outstanding sum of RM1,897,510 due and owing by the defendant to the plaintiff as the plaintiff's accumulated deducted and/or deferred monthly salary from November 2012 to December 2017; and

(d) damages thereto as well as damages for misrepresentation; and/or damages for undue influence.

THE TRIAL

[8] During the trial, the plaintiff called 11 witnesses while the defendant called three witnesses, including the plaintiff himself (PW11) and representatives from the defendant (albeit some of the defendant's directors were subpoenaed by the plaintiff as the plaintiff's witnesses).

SUBMISSION BY THE PLAINTIFF

[9] The plaintiff's submission can be summarised as follows:

[10] The plaintiff was employed by the defendant as a general manager of the defendant at all material times and the plaintiff's designation and/or role had never been changed to a consultant starting from 1 February 2015 until the plaintiff tendered his resignation letter dated 23 November 2017.

[11] There are representations from the defendant and/or the existence of an oral collateral contract that binds the parties for a temporary deduction and/or deferment of the plaintiff's salary, this has caused the plaintiff to agree to the deduction and deferment of the plaintiff's monthly salary starting from September 2012.

[12] The plaintiff had never waived his rights to claim for his outstanding monthly salaries from the defendant. With regard to the issue on time limitation, the plaintiff argued that it is irrelevant for the plaintiff to take action against the defendant for breach of the employment contract and/or the oral collateral contract until the defendant itself had decided not to honour the oral collateral contract via the defendant's letter to the plaintiff dated 2 August 2018. Thus, the plaintiff's claim is not barred by the Limitation Act 1953 because the date of accrual of the cause of action and/or the date of the breach of contract by the defendant only started to run from 2 August 2018 which was the date the defendant had decided to not honour its representations and/or promises made to the plaintiff via the defendant's letter to the plaintiff dated 2 August 2018.

[13] The plaintiff's claim can be summarised as follows:

(a) that there exists an oral collateral contract between the parties; and

(b) that there exist representations and/or promises made by the defendant in September 2012 to return and/or refund the deducted salaries to the plaintiff.

And the plaintiff prayed for this court to allow his claim against the defendant.

SUBMISSION BY THE DEFENDANT

[14] To counter the plaintiff's allegation, the defendant submitted that there was no oral collateral contract and/or any representation or promise made by the defendant to fully pay the deducted salary or consultancy fees from September 2012 to December 2017 to the plaintiff as the substratum of the alleged collateral contract ie the 'Scott Tower Project' and 'My Penchala Residence Project' did not even exist in September 2012.

[15] The 50% reduction of the plaintiff's salary was consented by the plaintiff and there was never any understanding or representation that the reduced salaries were meant to be deferred and to be paid back later.

[16] Similarly, from September 2012 until June 2014, the plaintiff had accepted the deducted salary of RM20,200 without any objection and/or complaints and from February 2016 to January 2017, the plaintiff accepted all the consultancy fees from the defendant and signed all the payment vouchers without any objection and/or complaints. The plaintiff had never made any demand and/or claim for the alleged outstanding deferred salary.

[17] Prior to the plaintiff's resignation on 23 November 2017, the plaintiff had never made any demand and/or claim for the alleged outstanding deferred salary. Also, The Scott Tower Project and My Penchala Residence Project were never launched.

[18] Besides, there was no undue influence, misrepresentation, duress, coercion, manipulation, mistreatment and/or domination exerted by the defendant on the plaintiff.

[19] The defendant also further premised that the plaintiff's claim is also time-barred. This is due to the fact that the plaintiff had failed to object and/or protest and/or make any demands and had accepted the deducted salaries and consultant fees for six years and three months.

[20] As such, the plaintiff's claim should be dismissed.

FINDINGS AND DECISION OF THE COURT

[21] After perusing the cause papers, the witnesses' statements, the notes of proceeding, the written and oral submissions and replies by the parties, I dismiss the plaintiff's claim. Herein are my reasons.

[22] Before I continue further, it is apt to stress here that the burden of proof lies on the plaintiff to prove the facts alleged and pleaded in the statement of claim by adducing evidence (ss 101 and 102 of the Evidence Act 1950).

[23] As I made it clear to the parties, this claim is purely a contractual dispute. This claim has nothing related with employment dispute. Otherwise, the proper procedure is for the matter to be referred to the industrial court. It is my finding that the disputes in this claim are mainly concerning the following four issues:

(a) whether there exist any representations and/or promises made by the defendant in September 2012 to return and/or refund the deducted salaries to the plaintiff;

(b) whether the plaintiff was indeed appointed as a consultant in 2015; and

(c) whether there was indeed any undue influence/coercion; and

(d) whether there is any estoppel.

I shall elaborate them in turn to explain my decision in dismissing the plaintiff's claim.

Whether there exist any representations from the defendant and/or oral collateral contract that binds the parties?

[24] The plaintiff submitted that the defendant and/or its affiliate companies were developing two new projects namely the 'Scott Tower Project' as well as 'My Penchala Residence Project'. Hence, the defendant assured and/or promised that the defendant should fully pay, refund and/or return to the plaintiff all the reduced and/or deferred salary payments in full after the defendant's financial standing had improved.

[25] The plaintiff further premised that the defendant had induced the plaintiff to enter into the oral collateral contract by using these two new projects as an assurance. The defendant at all material times was aware that the plaintiff has no knowledge, control and/or power over the said projects as a general manager.

[26] Based on the above, the plaintiff had agreed to enter into the said oral collateral contract with the defendant in September 2012. The plaintiff agreed to the reduction of the plaintiff's salary strictly on the basis of the promises and representations made by the defendant to the plaintiff which was in turn essentially based on trust, understanding and good faith arising out of the long standing close relationship between the plaintiff and the defendant company and the Indran family who were basically the owners of the defendant company.

[27] The plaintiff refer to the Court of Appeal case of *Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576; [2010] 2 MLRA 1 where Abdul Malik Ishak JCA held:

> [27] To trigger an inducement, two essential elements are necessary. Firstly, the representee must in fact rely on the representator's statement in the contract concerned. Secondly, the representor at the time of entering the contract, must have intention, or at least realise, that the statement will, or probably will, be relied upon by the representee.
>
> [28] Thus, both the representees' reliance on a misstatement and the representor's intention to induce are material in cases of misrepresentation. *The court would infer that the representor intended to induce by looking at the circumstances in which the representation was made*. (Emphasis added.)

[28] The plaintiff also referred to the Court of Appeal case of *Pembinaan SPK Sdn Bhd & Anor v Conaire Engineering Sdn Bhd-LLC* [2022] 2 MLJ 659; [2022] 4 CLJ 357 where Gunalan Muniandy JCA in delivering the judgment of the court held:

> [101] Also to *Segaran Mathavan lwn Landfeld Quasa Engineering Sdn Bhd & Yang Lain* [2014] 1 LNS 158 at paras 27 and 28 p 22, where it was held that *the court should consider 'circumstantial evidence' and proceed to look at all the surrounding factors and weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact' when the witnesses gave conflicting evidence*. (Emphasis added.)

[29] To rebut the above, the defendant submitted that those two new projects were not within the contemplation or knowledge of the defendant at that material time. The purchase of the land for Scott Tower Project was only done in 2013 whereas, for My Penchala Residence Project, the purchase of the land was done in 2016. Also, the development order for the Scott Tower Project was only obtained by the defendant on 27 January 2016 whereas for My Penchala Residence Project, the development order was obtained on 11 June 2018. Both development orders can be seen in Bundle B6 at pp 519–528 and Bundle C1 at pp 1206–1224 respectively.

[30] The defendant further submitted that the discussion, consultant meetings, planning, and submission of documents of these two projects were done around 2015–2016 and these facts were confirmed by the surveyors and architects of the defendant who were subpoena-ed by the plaintiff himself as follows:

> (NOP dated 10 November 2021 in encl 173 at pp 65, 66, 68 and 69)
>
> PC: Mr Chua can you confirm and recall when this meeting has taken place?
>
> PW1: For the 1418 the meeting was consulted on 15 November 2016
>
> PC: Ok next on 1152
>
> PW1: 1st November 2016, 18th October 2016, 20th September 2016, 6th September 2016, 23rd of August 2016, 9th august 2016, 26th July 2016, 12 July 2016, 14th June 2016, 27th May 2016, 14th June 2016
>
> ...
>
> DC: Understand Yang Arif. Mr Chua my learned has referred you to page number 1148 to 1188 earlier right
>
> PW1: Yes.
>
> DC You have stated that the meeting took place on 2016 right?
>
> PW1: Yes.
>
> DC: The Scott Tower project took place in 2016 and not 2013, agree with me?

PW1: Yes

(NOP dated 11 November 2021 in encl 174 at pp 63–64)

DC: Looking at p 552 same page this report prepared on 28/12/2016, correct?

PW3: Yes ...

DC: So all the while the preparations, meeting and discussions were done in the year of 2016?

PW3: Yes.

DC: Not any time prior 2016?

PW3: Yes

[NOP in encl 174 at page 50]

DC: Can you please refer to bundle C1 at p 1148–1184. The pages referred by my learned friend earlier. These are minutes of meeting for Scott Tower Project. Agree with me?

PW7: Yes.

DC: All these meetings were taken place in the year 2016 and not 2012, agree with me?

PW7: Yes.

[31] Based on the above, the defendants submitted that none of the above have taken place in September 2012 as alleged by the plaintiff. The defendant further submitted that there is not any single document being produced by the plaintiff to show that these projects were already in existence in 2012 and this was confirmed by the plaintiff himself during cross-examination as follows:

(Refer NOP dated 04 October 2022 in encl 184 at pp 22 & 25)

DC: Mr Yoon, can you refer back to paragraph 18(a) of your statement of claim, here you state Scott Tower consist of 32 storey office, yes or no?

PWS11: Yes.

DC: How did you derived this information in September 2012?

PWS11: Because the planning for this project was started in 2011, after we finished the phase 1 of the Scott Garden in Old Klang Road. In fact, we already involved in doing the preliminary drawings.

DC :Any document to show that the planning for Scott Tower started in 2011, can you show to the court?

PWS11: No I don't have

...

DC: I put it to you Mr Yoon, that there is no document pertaining to the discussion of the Scott Tower project, made in 2011, neither it was made in 2012.

PWS11: I don't have the documents, so I agree with you.

[32] Since the plaintiff assets that there is such an oral agreement, the onus is on him to prove it on the balance of probabilities (ss 101 and 102 of the Evidence Act). The factual matrix of each case must be established to build a cogent, clear and reliable case on such oral agreement. To be accepted, it must also be corroborated by other evidence. To this end, this court must rely on contemporaneous documents which would provide the best evidence of what the parties intended at the time of the transaction. It would be difficult to find any other evidence that is more reliable, except for direct evidence of the parties' oral testimony, which in this case is clearly at odds with the contemporaneous documents. It is trite law that, such contemporaneous evidence can provide the best evidence of the terms of the contract and the parties' intentions at the time of the contract, and should therefore be accorded great weight.

[33] From the facts of this instant case, it appears that the defendant has argued that there was no oral collateral contract and/or any representation or promise made to fully pay the deducted salary or consultancy fees. The defendant has also pointed out that the substratum of the alleged collateral contract, ie, the 'Scott Tower Project' and 'My Penchala Residence Project,' did not exist in September 2012. defendant has argued that there is evidence from various sources, such as independent witnesses, contemporaneous documents, and the plaintiff's own messages and emails, which suggests that the Scott Tower Project and My Penchala projects did not exist in September 2012. Therefore, the defendant contends that it cannot be the subject matter of any alleged oral collateral contract with the plaintiff.

[34] The plaintiff, on the other hand, has argued that the pay cut was upon the promise to pay the differed payment, and has relied on his own oral statement as evidence of the existence of the contract. The plaintiff referred to the following ratio of the case *Muhamad Ridhwaan bin Mohamed Rafik v Regatta Maritime Sdn Bhd & Ors* [2022] MLJU 2442:

...

(a) the burden of proof of proving the existence of the oral contract and the alleged illegality lies with the plaintiff;

(b) this burden remains with the plaintiff and is not shifted to the defendants;

(c) if the plaintiff proves the existence of the alleged oral contract, then it is for the defendants to prove the defences raised in their defence;

(d) to prove his claim, the plaintiff must be able to produce sufficient evidence and show on the balance of probabilities that the said oral contract existed. This burden is not satisfied merely on guesswork, speculation, surmises, or conjectures;

(e) *generally, our curts expect that oral contracts are not only shown by oral testimony of witnesses but are usually supported by corroborative evidence such as consistent conduct of parties and documentary evidence indicating the existence of such oral contracts*; and

(f) the burden of proof should not be confused with evidential burden. The evidential burden shifts as when evidence is produced to the satisfaction of the court. (Emphasis added.)

[35] The plaintiff also referred to the case of *Thiagarajen a/l Veluchamy v Suraish Naidu a/l Re Naidu & Anor* [2009] 9 MLJ 68 which I can easily distinguish here. In that case, there were corroborative documents presented as evidence to support the existence of the oral contract. One such document was a letter from the plaintiff to the defendant, which referred to the agreement to sell the shares at the agreed consideration of RM150,000. There was also a letter from the defendant to the plaintiff acknowledging the receipt of the payment for the shares. These documents were considered by the court in determining the existence of the oral contract.

[36] However, in our present case, the plaintiff has not provided any corroborating evidence to support his claim. He only has relied solely on his own oral statement as evidence of the existence of the contract. In fact, the contemporaneous documents had not supported or collaborated the existence of such oral contract.

[37] Based on this analysis, it seems that the defendant's argument that no oral contract existed is more convincing, as there is no clear evidence to support the plaintiff's claim. The plaintiff has failed to establish his case on the balance of probabilities. As a result, the defendant cannot be held liable for any breach of contract or other contractual obligations since there was no contract to begin with.

[38] Based on the above, I am with agreement with the defendant. For the plaintiff to establish the oral contract, it must not only be shown by oral testimony, but it must also be corroborated with documentary evidence and/or the parties' conduct. This is indeed the ratio of *Muhamad Ridhwaan* quoted by the plaintiff.

[39] Unfortunately, I find the plaintiff had failed to produce, not only oral testimonies but also documentary evidence to prove the existence of the oral contract.

A **[40]** The plaintiff had also attempted to invite the court to consider the circumstantial evidence to prove the existence of the oral contract but failed.

[41] After considering the evidence available before me, it is improbable for me to draw a conclusion that there was a promise or representation made by the B defendant to the plaintiff in 2012 when the facts and evidence clearly show that both projects had yet to exist and were not within the knowledge of the defendant. This was reflected by the evidence before me that Scott Tower Project and My Penchala Residence Project did not even exist in 2012. Also, it is crucial to note that the plaintiff had earlier demanded for the repayment of C some advancement (of his credit card payment) that he was paying on behalf of the defendant. At this point in time, he has never mentioned about the bigger indebtedness here: the arrears of the other half of his salaries which as he claims now amounting to more than a million. The absent of this in this letter or in any of his letters (or even communication) to the defendant during those few D years is against common sense if at all there really exists such an oral arrangement to pay back the arrears. He had admitted that he is a season (general) manager who has the expertise of managing projects and finances. A senior and seasons corporate person like him would never fail to put any such E crucial arrangement into writing. The absent of such natural and ordinary practise (to put this arrangement into writing or to mention this in any of the communication during those few years) from a season and educated manager like him would only confirm my finding that there was indeed never such an arrangement.

F

[42] Based on the contemporaneous evidence, I find that the plaintiff had failed to prove that there exists such representation or promise made by the defendant in September 2012.

G

[43] Since I have decided earlier that the plaintiff had failed to prove that there exists an oral collateral contract between the plaintiff and the defendant, it is irrelevant for me to discuss on the issue of liability when there is no contract between the parties in the first place.

H

Whether the plaintiff had been appointed as the defendant's consultant effective 1 February 2015

[44] The plaintiff in his submission has submitted in length on the issue of I whether the plaintiff was employed by the defendant as a general manager of the defendant. However, the defendant had never disputed or denied the plaintiff's role and designation as the general manager of the defendant from 2004 to 31 January 2014. Therefore, I find it irrelevant for me to address that issue further.

[45] I will now address the more relevant issue ie whether the plaintiff's designation was changed from general manager to that of a consultant of the defendant effective 1 February 2015.

[46] The defendant submitted that the plaintiff's designation and/or role was changed from a general manager to a consultant on 1 February 2015 and the plaintiff was given consultant fees on an 'ad hoc' basis thereafter. This was due to the lack of jobs and lack of projects at the material time.

[47] Despite there was no written agreement between the parties in terms of the change of designation and/or role from a general manager to a consultant, based on the contemporaneous documents and the conduct of the parties, the defendant submitted that there was sufficient evidence to suggest the same.

[48] The defendant submitted that, due to the 'ad hoc' consultant arrangement, the plaintiff was not given any payment from February 2015 to November 2015. The defendant had advanced RM25,000 to the plaintiff in December 2015. Thereafter, the plaintiff was given consultant fees of RM15,000 between February 2016 and May 2016 and RM10,000 between June 2016 and January 2017. Each of the consultant fee statements was signed and accepted by the plaintiff voluntarily without any objection.

[49] To prove the above, the defendant referred this court to the plaintiff's salary slips for the year 2014 at p 466–470 of Bundle B2 and the defendant's payment voucher dated 9 December 2015 and the defendant's Public Bank cheque No 010084 dated 9 December 2015 at pp 450–451 of Bundle B1. I have found this evidence sound and reliable.

[50] Meanwhile, the plaintiff in the question-and-answer No 49 of the amended plaintiff's witness statement referred to his EA forms as follows:

> Q49: With reference to pp 1–10 and 11–25 of the Ikatan Dokumen Bersama Yang Dipersetujui Dipinda (Jld 1), Bahagian A, could you please tell the court what documents are these?
>
> A49: These are my EA Forms which had clearly stated that I was the general manager of IDSB from 1994 to 2004 and the general manager of the defendant Company, Aston Villa Sdn Bhd from 2004 to 2016.

[51] The plaintiff through PWS1, PWS2, PWS7 and PWS8, also tried to establish that the plaintiff had always been the general manager of the defendant.

[52] However, the defendant submitted that these witnesses being subpoenaed by the plaintiff are not employees or internal staffs of the

defendant. They are not aware of the day-to-day internal affairs of the defendant. Referring to the notes of proceedings ('NOP') dated 10 November 2021 in encl 173 at p 71 (for PW1), NOP dated 11 November 2021 in encl 174 at p 40 (for PW2), NOP dated 11 May 2022 in encl 180 at pp 60–61 (for PW7), and NOP dated 11 May 2022 in encl 180 at p 92 (for PW8), I am in agreement with the defendant regarding this.

[53] These notes have all clearly shown that these witnesses have no knowledge, whatsoever, should there be any change in the designation of the plaintiff because they were not the employees of the defendant. Therefore, they did not have any knowledge of the internal business of the defendant.

[54] Furthermore, the defendant invited this court to draw a comparison between the plaintiff's salary slips for the year 2014 and the consultant fee statement for the year 2016. The defendant premised that in 2014, mandatory deductions for an employee such as Employees Provident Fund ('EPF') and income tax deductions were deducted from the plaintiff's salary. However, for the year 2016, as can be seen in pp 471–481 of Bundle B2, the above mandatory deductions were never deducted from the plaintiff's consultant fees.

[55] This was also confirmed by the plaintiff himself (PW11) during the cross-examination (NOP dated 4 October 2022 in encl 184 at p 38):

> DC: Refer p 466, same bundle, this is salary statement issued by the defendant for December 2014 and the same was signed by you, correct?
>
> PW11: Yes, were received by me.
>
> DC: Can you read to the court, the amount of EPF contribution and income tax deduction, stated in page 466?
>
> PW11: EPF (inaudible) deductions 3,485, net salary 19,715.
>
> DC: Okay refer back to page 471, where you were paid consultant fees of 15,000 for the month of February 2016. Is there any EPF and tax deduction being stated there?
>
> PW11: No.
>
> DC: All the way from p 472–481, same bundle, was there any EPF contribution and income tax deduction from page 472 – 481?
>
> PW11: No, (inaudible)
>
> ...
>
> DC: You agree with me that in 2016, you were also paid some consultant fee. Yes or no?
>
> PW11: No, salary discussed as a consultant fee.
>
> DC: Did the defendant make any tax deductions for your salary in 2016?

PW11: No

[56] The above strengthens the fact that the plaintiff's designation was indeed changed from general manager to consultant of the defendant in 2016. The fact that the plaintiff did not demand for his income tax deduction to be made or lodge any complaints to that effect shows that the plaintiff had accepted his role and designation as a consultant for the defendant. It is to be mindful that any dissatisfaction or grouse that the plaintiff has concerning that should be addressed to the industrial or labour courts for this claim is nothing about employment dispute. Rather, it is concerning the recovery of salaries in arrears (if any) and the ancillary issues thereto. My earlier discussion on case law concerning contemporaneous documents play important role to assist a trial judge in arriving at his finding stands relevant here.

Whether there was any undue influence and/or coercion?

[57] The plaintiff also claimed that the defendant had coerced and unduly influenced him into signing the defendant's payment voucher or salary slip with the untrue and misleading words 'CONSULTANT FEE' in order to obtain his monthly salary. The plaintiff also claims that the defendant did not justify the 50% salary deduction and had violated his rights as an employee.

[58] To this, the defendant has referred to the definition of coercion under s 15 of the Contracts Act 1950, which defines coercion as committing or threatening to commit any act forbidden by the Penal Code or the unlawful detaining or threatening to detain any property with the intention of causing any person to enter into an agreement. The defendant contended that there was no written agreement between the defendant and the plaintiff as regard to the change of position from general manager to a consultant. However, based on contemporaneous documents and conduct of the party suggested that the plaintiff had agreed to such change and accepted the payment of consultancy fees on ad hoc basis. The consultancy slip was signed by the plaintiff voluntarily at all material time. This was also indeed confirmed by the plaintiff himself during cross examination wherein he has confirmed receiving the salary statement without EPF contribution or income tax deduction and did not file any complaint with the income tax department or any authorities.

[59] The defendant further submits that there is no threat or any forbidden act by the defendant. It does seem unlikely that undue influence or coercion was exerted on the plaintiff in this claim. The defendant has presented several factors that suggest the plaintiff was in a position of power and authority within the defendant's organisation, and there is no evidence of any forbidden act or threat that could be considered coercive or undue influence. Additionally, the plaintiff's admission that the relationship between him and the defendant was

always cordial further undermines the claim of undue influence or coercion. In fact, it is my observation that due to the long-standing employee status of the plaintiff in the defendant and all other companies of the late S Indran family and the close friendship between the plaintiff and the late S Indran (which was established by the plaintiff), the plaintiff was the one having all the privilege position in the companies; The children of the late S Indran (including the managing director and directors of the defendant) respectfully called him uncle. Also, from the way the plaintiff conducted himself during the trial and the way he described the current management of the defendants and all other companies of the family and criticising them as inexperience or doing nothing, it is my finding that he is the one always in a better position to influence the management of the defendant instead of the other way round. He had also spent a great deal during trial to narrate and establish how he had made crucial decision of the companies and how great his achievement in the defendant had been. I see no evidence to suggest that he was unduly influenced by anyone of the management of the defendant at all. Nether was there any evidence to remotely suggest any coercion in this claim. Hence, his claim of undue influence and/or coercion has failed miserably.

[60] It is trite that undue influence could be either actual or presumed. Under actual undue influence, the burden of proof is on the claimant/plaintiff to show that the wrongdoer/defendant had exerted undue influence on the earlier to enter a particular transaction. Meanwhile, presumed undue influence is when the complainant/plaintiff only has to show that there was a relationship of trust and confidence between the complainant/plaintiff and the wrongdoer/defendant. Such relationship could be established in two ways:

(a) certain relationship such as the relationship between a solicitor and his client; or

(b) in the event that the relationship is not as provided under (a), the complainant may prove that there is a de facto existence of a relationship that the complainant generally reposed trust and confidence in the wrongdoer.

(See *Polygram Records Sdn Bhd v The Search & Anor* [1994] 3 MLJ 127 at pp 153–154; *Barclays Bank plc v O'Brien & Anor* [1993] 4 All ER 417 at p 423).

[61] But for mere allegation of such undue influence, the plaintiff in our present case, has not stated nor established anything toward this. Thus, I see no reason to consider this baseless accusation.

[62] As for coercion, generally, there are two ways of committing 'coercion' as defined by s 15 of the Contracts Act 1950: either it is the threatening of an

act forbidden by the Penal Code or it is the unlawful detention or the threatening of such to the prejudice of any person with the intention of causing any person to enter into agreement (see *Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331 at p 337).

[63] It is trite that any contract that is entered by way of coercion is voidable at the option of party whose consent was so caused (namely the plaintiff here). The burden of proving such coercion lies on the party who alleges that there was coercion which again is on the plaintiff in our present case (see *Hua Realty Berhad v KTS News Sdn Bhd* [2009] MLJU 75). However, here again, the plaintiff has not furnished any evidence to establish this. Thus the plaintiff's allegation of coercion is again a failed mission.

[64] Likewise, I see no solid evidence or support to establish any mistake in this case. In similar veins, there is nothing to convince this court of any unilateral mistake.

Whether there is any estoppel?

[65] I shall address this last issue here for the purpose of completeness.

[66] As an alternative point, the defendant submitted that the 50% deduction of the plaintiff's salary was agreed upon and consented by the plaintiff. This is indeed an alternative argument by the defendant. Like what I have addressed above, there was nothing to suggest or prove any understanding or representation that the deducted salaries were meant to be deferred and to be paid later. However, in the event that there was indeed such an oral contract, the following would be relevant.

[67] For the alternative argument, the defendant further argued that, by conduct, the plaintiff had accepted the reduced salary of RM20,200 from September 2012 until June 2014 without any objection and/or complaints. This confirms my earlier finding of the conduct of the parties during the material times.

[68] The plaintiff also did not make any complaints when his designation was changed to a consultant on 1 February 2015. From February 2016 to January 2017, the plaintiff had accepted all the consultant fees from the defendant and had signed all the payment vouchers without any objection and/or complaints.

[69] The defendant submitted that it defies logic and common sense for an individual like the plaintiff to keep silent when he was not paid in full or not paid salaries at all.

[70] I agree with the defendant above that the only inference that can be drawn from the plaintiff's conduct and silence and lack of objection for a long period of time is that the plaintiff had consented and/or accepted the 50% pay deduction and the change of his designation to a consultant of the defendant (s 115 of the Evidence Act 1950).

[71] I refer to the Federal Court case of *Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where the Federal Court stated that the doctrine of estoppel may apply where a party has made a representation that induces another party to act to its detriment. The court noted that the representation may be by words, conduct or even silence, and that the key question is whether it would be unconscionable for the party making the representation to resile from it. The court also stated that estoppel operates not as a cause of action in itself, but as a rule of evidence that prevents a party from denying the truth of a representation that has been relied upon by another party. This means that a party seeking to rely on estoppel must establish that the representation was made and that it was relied upon to its detriment. If these elements are established, the party making the representation may be estopped from denying its truth, even if that party had no intention of making a false statement. The late Gopal Sri Ram JCA (as he then was) held at p 344 (MLJ); at p 294 (CLJ), paragraph h that:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstance of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[72] I also refer to the NOP dated 4 October 2022 in encl 184 at pp 91 and 111:

> DC: Agree with me that you did not take any action from 2012 to 2017 even though you felt something was not right?
>
> PWS11: Yes.
>
> DC: You thought you was misrepresented PWS11 Yes
>
> DC: Ok, you did not take any action, yes or no? PWS11 Not at that time.
>
> ...
>
> DC: Ok Mr Yoon, why did you wait until November 2017, when you could resign anytime in 2017 since you have not received payment from the defendant?
>
> PWS11: I choose my own time, I see the Fung Shui.
>
> DC: You choose your own time as and when you like? PWS11 Yes. I am planning to go overseas at that time.

[73] The defendant contended that the plaintiff's silence and lack of objection had led the defendant to believe that the plaintiff had agreed and accepted the 50% salary reduction and the change of his designation to become the defendant's consultant. The plaintiff, from 2012 to 2017 kept silence on his right on demanded salary and clearly had waived his rights to claim there was a breach of his employment contract. According to the defendant and as mentioned earlier, it defies logic and common sense for an individual like the plaintiff to keep silent when he was not paid in full or not paid salary at all. Thus, it can be inferred that the plaintiff had consented and/or accepted the 50% pay deduction in September 2012 and the change of his designation to a consultant to the defendant.

[74] The plaintiff on the other hand, alleged that he had agreed to a temporary 50% salary deduction to help alleviate the company's financial difficulties, but only under the condition that the company would repay him in full at a later date. The plaintiff claimed that the defendant made promises and representations that led him to not claim his unpaid salary until the defendant breached his contract. The plaintiff argued that there was an oral collateral contract between him and the defendant, which obliged the defendant to repay his arrears of deducted and deferred salaries when their financial situation improved. The plaintiff cited *Sulisen Sdn Bhd v Kerajaan Malaysia* [2006] MLJU 341; [2006] 7 CLJ 247 to support his argument that the oral collateral contract is a valid and enforceable agreement. However, the plaintiff in this claim had failed to show to this court that the oral collateral contract ever existed. There was no collaborating evidence to that effect. Also, even with this oral contract, what is there to stop the plaintiff from issuing a simple letter in writing to reflect such arrangement? As submitted by the defendant, nothing of such nature has been done here!! Therefore, the plaintiff indeed is barred by doctrine of estoppel to claim that there was a breach of his employment contract and later demanded his contention of unpaid salary.

[75] Based on the above, I find that the plaintiff's conduct had encouraged the defendant to believe that the plaintiff did not intend to dispute or challenge the 50% salary deduction and the change of his designation as the consultant of the defendant (if at all). Therefore, I find that the doctrine of estoppel is applicable here. The plaintiff is estopped to contend that he did not agree with the 50% salary deduction and the change of his designation when he failed to take any reasonable actions within reasonable time.

[76] On the issue of estoppel due to time limitation, the plaintiff argued that the accrual date for the cause of action started on 2 August 2018 ie, the date of defendant's letter to the plaintiff and not the time the alleged oral contract/ representation was made. On this, I agree with the defendant's counsel that this claim is ultimately barred/ estopped by the doctrine of limitation. Section 6(1)

of the Limitation Act 1953 has clearly stated that for contractual dispute, the limitation is six years from the day on which the cause of action accrued.

[77] In this circumstance, the actual accrual date for the plaintiff's cause of action is around September 2012, ie, the date of the first salary deduction. The plaintiff tried to argue that his inaction was because of his long-standing close relationship and association with the late Mr S Indran's children and representation made by the defendant. I see no reason to agree with the plaintiff here. Firstly, whether there was a long-standing relationship between the plaintiff and the defendant or not, the limitation period is still running. Secondly, since the plaintiff failed to prove that there was such representation made by the defendant, the plaintiff's argument clearly does not hold water.

[78] It is of utmost importance for the plaintiff to not sleep on his right. Hashim Yeop A Sani J in Federal Court case of *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182 at 189 articulated that:

> To set out the general principles first, it is an established rule of equity that *a plaintiff in equity is bound to prosecute his claim without undue delay*. A court of equity would refuse its aid to stale demands, ie where the plaintiff has slept upon his right and acquiesced for a great length of time. For 'laches' literally means negligence inactivity. He is then said to be barred by his laches. (*Halsbury*'s (3rd Ed) Vol 14, p 641). In determining whether there has been such delay as to amount to laches the main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part. Of course acquiescence depends on 'knowledge, capacity and freedom'. It is not necessary however that the plaintiff should have known the exact relief to which he was entitled. As regards the change in the defendant's position regard must be had whether the defendant has lost the evidence necessary of meeting the claim, for a court of equity will not allow a dormant claim to be set up when the means of resisting it have perished. (Emphasis added.)

CONCLUSION

[79] On the balance of probabilities, I find that the plaintiff had failed to prove his claim against the defendant. The plaintiff was unable to adduce any evidence to collaborate and establish that the defendant had given a representation and/or promise to pay the deducted and/or deferred payments of the plaintiff's monthly salary.

[80] Based on the evidence presented before me, I also find that the plaintiff had failed to prove the existence of the oral collateral contract between the parties. Also, the plaintiff himself has committed laches and provide no acceptable reason for his delay in enforcing/perusing his right other than a mere saying of 'feng shui'. He is therefore estopped by his own conduct, and by the operation of doctrine of limitation to argue anything otherwise.

[81] On the above reasons, I dismiss the plaintiff's claim with cost.

Claim dismissed.

Reported by Ashok Kumar